

**B. IAC Will Suffer Irreparable Harm If A Stay Is Not Granted.**

By announcing an auction at this time, the FCC has put IAC in an untenable position. While it is continuing to pursue its legal rights to its fifteen IVDS licenses, it is simultaneously being threatened with the imminent reauction of these licenses. Should participants in such a reauction submit high bids for any of the contested IAC licenses, it would create one or more additional claimants to these licenses with inevitable future litigation. Without a stay, IAC runs the risk of losing forever one or more of its licenses, (see pp. 21-22 infra), which would clearly constitute irreparable injury. Regardless of who bids on the IAC licenses at any reauction, IAC would unreasonably be compelled to spend both time and money to protect its interests,<sup>18/</sup> while at the very same time attempting to pursue its rights before the court of appeals. Ultimately, if IAC prevails in its appeal, irreparable harm would be visited on successful bidders at the reauction. This is a scenario that the Commission can and should avoid.

Unfortunately, rather than take timely and necessary action to avoid competing claims to the fifteen licenses that are the subject of IAC's appeal, the Bureau has proceeded to schedule an auction. *To make matters worse, the Public Notice announcing the availability of the licenses does not even acknowledge that IAC has filed an appeal.* Regardless of the light in which the FCC's staff views IAC's appeal, it was certainly required to provide this information to potential bidders so that they would

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<sup>18</sup> Under the circumstances presented, this expenditure of time and money by IAC would be irreparable, in that it would not be recoverable under any scenario envisioned by the FCC.

have the benefit of drawing their own conclusions before putting their funds at risk. This failure of disclosure is made more astounding by two other facts.

First, the FCC's Public Notice *does* make the effort to disclose that the recent changes to the IVDS auction rules are *potentially* subject to petitions for reconsideration — despite the fact that there was very little disagreement among the four commenting parties with the actions actually taken in its Tenth Report & Order.<sup>19/</sup> It is arbitrary and capricious for the FCC to have selectively disclosed the possibility of reconsideration requests concerning rule changes that were largely unopposed, while failing to mention the fact that some of the licenses it proposes to auction are subject to a pending appeal before the D.C. Circuit. Such action is akin to attempting to sell real estate without disclosing a cloud on the title. The FCC's actions appear designed to do little more than maximize auction revenue to the government, no matter the cost.

Second, the FCC's failure to mention the pending appeal recalls in alarming ways the cavalier attitude taken in the initial IVDS auction, where the FCC also moved hastily to sell spectrum rights at a time when such haste proved unwarranted and counterproductive, with inadequate disclosures concerning the fledgling IVDS industry. The omission here is a critical failure on the part of the FCC to reveal to potential bidders

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<sup>19/</sup> Notably, a majority of the commenters in this proceeding urged the Commission to defer any reauction of IVDS spectrum until various issues, including those relating to the licenses that the FCC has since identified as "in default," have been resolved. See Comments of ITV, Inc. and IVDS Affiliates, LLC, PP Dkt. No. 93-253, at 7-9 (filed October 3, 1996); Comments of IVDS Licensees, PP Dkt. No. 93-253, at 3-6 (filed October 3, 1996); Comments of IAC, PP Dkt. No. 93-253, at 7-8 (filed October 3, 1996). The Commission did not address these issues in its Report & Order, and it ignored the record in that proceeding in announcing the reauction less than two weeks later.

material information concerning the spectrum rights offered. There is no reason to blindside these bidders with the revelation of the existence of IAC's prior claims following submission of bids at the February auction, dragging them unwittingly into court action.

**C.     A Delay Of The Auction Of The IAC Licenses Pending Appeal  
         Will Not Cause Harm To Others.**

While both IAC and potential bidders at the reauction would or could be damaged by a reauction of the IAC licenses, there is no countervailing potential harm to other parties that could result from the issuance of a stay. At this time, little if any effort has been expended by potential applicants that might wish to bid on the IAC licenses — and it is thus very important that the FCC issue a stay immediately in order to prevent such potential bidders from incurring even minimal costs in preparing an application to bid with the object of pursuing the fifteen IAC licenses. Only if the FCC delays in issuing a stay would there be a possibility of even negligible harm to any entity.<sup>20/</sup>

Even if IAC were ultimately unsuccessful in its appeal, delaying the reauction of its licenses would produce no harm in the interim to anyone. If necessary, an auction conducted at the end of 1997 instead of the beginning would work no disadvantage to those that eventually succeed in securing licenses. At the present time, IAC is unaware of any existing IVDS licensees that are in operation. Indeed, because of

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<sup>20/</sup>     Compare Request of Radiofone, Inc. for a Stay of the C Block Broadband PCS Auction and Associated Rules, DA 95-2496, slip op. at 3 (¶ 5) (adopted December 20, 1995).

the slow development of the IVDS equipment market, most licensees will be unable to commence construction of their facilities until some time in 1997, at the earliest. For this reason, it cannot be said that parties winning licenses at an auction in late 1997 would be unduly disadvantaged<sup>21/</sup> — indeed, they would likely benefit from avoidance of the legal and operational expenses incurred by initial round winners in the years between 1994 and 1997, when the IVDS industry was in its developmental stage and not yet ready for immediate launch. Those ultimately securing licenses in 1997 or 1998 would therefore be aided by the timing of their license grants, not disadvantaged.

Moreover, as noted above, the FCC could have filed a motion with the D.C. Circuit requesting expedited consideration of IAC's appeal in order to resolve this issue before announcing a reauction of the IVDS licenses. Having declined this opportunity, the FCC cannot claim that any exigent need to conduct the auction should permit it to ignore IAC's rights or the court's jurisdiction.

Finally, the fact that IAC's request applies to only a small portion of the licenses to be auctioned is also a factor weighing in favor of a stay. Elimination of the fifteen markets where IAC was previously the high bidder would not prevent the FCC from proceeding with an IVDS auction in mid-February, should it choose such a course. Most of the other parties that did not submit payments in 1994 have since relinquished any rights to these licenses by declining to seek review. Accordingly, the number of

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<sup>21/</sup> Compare id. (noting adverse consequences of delaying PCS C block auction).

licenses that could be affected by a stay is small, and need not derail the FCC's plan to conduct an IVDS auction on February 18, 1997.

**D. Grant of A Partial Stay Is In The Public Interest.**

For all of the foregoing reasons, grant of the limited relief sought by IAC will affirmatively serve the public interest. First, expeditious grant of such relief will prevent parties from incurring costs directed toward pursuit of these licenses at the February 1997 auction at a time when the FCC's ability to auction these licenses remains contested before the D.C. Circuit. Second, a stay will avoid any confusion or future litigation that would be likely to result from the reauctioning of the IAC licenses coupled with a court ruling requiring the Commission to reconsider IAC's request for waiver of the FCC's rules and extension of the initial IVDS downpayment deadline. Third, such a ruling will promote the integrity of the FCC's auction process by avoiding a situation where an auction winner's right to a license remains subject to the claim of a previous auction winner. Fourth, grant of a stay will enable the court proceeding to be resolved in due course and enable the spectrum to be developed and brought to the public in the most expeditious manner.

One final point should be emphasized. Under all the facts and circumstances presented, a grant of IAC's requested stay will clearly serve the public interest by preserving the Commission's own objectivity on any remand of IAC's appeal from the D.C. Circuit. The Court has consistently recognized not only the difficulty of "unscrambl[ing] the eggs" once multiple parties believe they have rights to the same

spectrum,<sup>22/</sup> but that "interim" FCC licensing decisions adversely influence subsequent decisions that impact those "interim" licenses:

Ordinary human experience tells us that these facts have a force which cannot always be set aside by the triers no matter how sincere their intent. . . . To argue . . . that [investments in interim or conditional licenses] may weigh in the balance of an otherwise close question is not a challenge to the good faith or integrity of the triers; it is a recognition that they are mortal men."<sup>23/</sup>

Here, the FCC, having unnecessarily created the second class of claimants, would be, as a practical matter, unable to ignore their interests when considering IAC's request for relief on any remand. There is, as set forth above, no sufficient public interest reason for allowing such a situation to develop. The reauction of IAC's contested licenses should be stayed.

### **III. REQUEST FOR RELIEF**

Based on the foregoing discussion, IAC respectfully requests that the Commission issue an immediate order staying, in part, the IVDS auction announced on December 4, 1996 by the Wireless Telecommunications Bureau. Such a stay should remove from the scope of that auction the fifteen licenses for which IAC was the winning bidder at the July 1994 IVDS auction. See footnote 1, supra. Expedited consideration of

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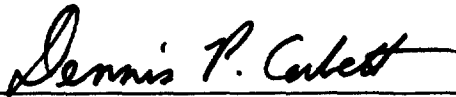
<sup>22/</sup> Sonesta Int'l. Hotels Corp. v. Wellington Associates, 483 F.2d 247, 250 (D.C. Cir. 1973).

<sup>23/</sup> Community Broadcasting Co. v FCC, 274 F.2d 753, 759 (D.C. Cir. 1960).

this request is imperative in order to apprise parties potentially interested in participating in the announced auction that the IAC licenses will not be available unless and until court proceedings have been finally resolved adversely to IAC. Accordingly, IAC respectfully requests that the Commission issue a decision in this matter within fifteen days of this filing.

Respectfully submitted,

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December 17, 1996

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